

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
	)	
Rural Broadband Experiments	)	WC Docket No. 14-259
	)	
	)	

**REPLY COMMENTS ON NEW YORK STATE  
PETITION FOR EXPEDITED WAIVER**



The American Cable Association (“ACA”) hereby submits reply comments in response to Wireline Competition Bureau’s (“Bureau”) Public Notice<sup>1</sup> on the New York State Petition for Expedited Waiver (“Petition”) of the Connect America Phase II (“Phase II”) auction rules.<sup>2</sup> ACA members provide voice and broadband Internet access (“broadband”) services across the country, including in New York.<sup>3</sup> As such, they have an interest in where and how the Federal

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<sup>1</sup> Public Notice, “Wireline Competition Bureau Announces Deadlines for Filing Comments and Replies Regarding New York State’s Petition for Expedited Waiver of the Connect America Phase II Auction Rules,” WC Docket No. 10-90, DA 16-1180 (rel. Oct. 13, 2016).

<sup>2</sup> *Connect America Fund et al.*, New York State Petition for Expedited Waiver, WC Docket No. 10-90 *et al.* (Oct. 12, 2016).

<sup>3</sup> ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. These

Communications Commission (“Commission”) allocates Phase II support. On their behalf, ACA has participated extensively in the Connect America Fund (“CAF”) proceedings since the initial order was adopted in 2011,<sup>4</sup> and it has been steadfast in advocating that the Commission use CAF support as efficiently as possible to facilitate the deployment of broadband service to areas where unsubsidized providers do not already offer such service.

ACA believes the Petition has many potential benefits, particularly as an experiment to determine how federal and state programs can work together to most efficiently bring high-performance broadband service to unserved areas efficiently and expeditiously. The “New NY Broadband Program” on its own has many merits, including its use of an efficient reverse auction process to award support to bring high-performance broadband service to unserved areas relatively quickly. Moreover, in the Petition, New York State explains that in seeking to access and allocate the entire amount not elected by Verizon over a six year period (\$170 million) in the Phase II process, it would “allocate the CAF funding only in the census blocks the FCC determined to be eligible for the CAF auction,” “not commit CAF funds to a specific buildout unless it also had committed New York broadband program funds to the same project,” and not exceed the reserve price for an eligible census block in the period specified by the FCC.”<sup>5</sup> ACA commends New York State for setting forth these conditions. Unfortunately, as discussed below, because the Petition is legally infirm and the Bureau cannot and should not grant it, the State should reconsider its proposal and work within the FNPRM process so that the Commission can best address and resolve all issues.

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providers pass approximately 19 million households of which 7 million are served. Many of these providers offer service in rural communities and more remote areas.

<sup>4</sup> *Connect America Fund et al.*; WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) *aff’d sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10<sup>th</sup> Cir. 2014).

<sup>5</sup> Petition at 8.

New York State avers that the waiver would “further congressional intent and the express terms of Section 254 of the Communications Act.”<sup>6</sup> However, nowhere does New York State cite to – or otherwise make a sufficient case for – specific and adequate statutory authority for the Bureau to take the unprecedented step of awarding it control over the allocation and accountability of Federal universal service funding. This flaw in the Petition – that it is inconsistent with the legal framework of Section 254 of the Communications Act of 1934, as amended<sup>7</sup> – is discussed both by the Wireless Internet Service Providers Association (“WISPA”) in its Opposition<sup>8</sup> and ViaSat in its comments.<sup>9</sup> WISPA explains that pursuant to the statute, Federal universal service support can only be awarded to an eligible telecommunications carrier designated pursuant to Section 214(e) of the Act – and not to a state governmental entity as the Petition requests.<sup>10</sup> ViaSat explains that pursuant to the statute, the Commission is to retain ultimate control of the distribution of Federal universal support and does not have the authority to delegate it to other entities, including state governments.<sup>11</sup> This limitation on the Commission’s authority is further evidenced by the many alternatives the Commission itself presents in the 2016 Further Notice of Proposed Rulemaking (“FNPRM”) for assuring an equitable state allocation of support – none of which include delegating control of the funding to the states.<sup>12</sup>

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<sup>6</sup> *Id.* at 14.

<sup>7</sup> 47 U.S.C. § 254(e).

<sup>8</sup> Opposition of the Wireless Internet Service Providers Association to the New York State Petition for Expedited Waiver, WC Docket No. 10-90 *et al.* (Oct. 24, 2016) (“WISPA Opposition”).

<sup>9</sup> Comments of ViaSat, Inc., WC Docket No. 10-90 (Oct. 24, 2016) (“ViaSat Comments”).

<sup>10</sup> WISPA Opposition at 2-3.

<sup>11</sup> ViaSat Comments at 6-7.

<sup>12</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, ¶¶ 218-224 (rel. May 26, 2016).

WISPA also correctly points out that the Petition is procedurally defective. It requests a waiver of rules (Section 54.312 *et seq.*) that either do not exist or have nothing to do with the award of Phase II support pursuant to a competitive bidding process. In other words, a waiver is not the proper procedural course. In fact, this highlights the fact that in addition to asking the Bureau to undertake an *ultra vires* action, the Petition is asking the Bureau short circuit and prejudge the outcome of its pending FNRPM and the potential adoption of rules that could lawfully ensure an equitable distribution of support among all states. In sum, without any consideration of the numerous policy issues involved in the Petition, the Bureau must reject the Petition because it is unlawful.

As stated at the outset, ACA believes the objective of New York's Petition is commendable in many ways. By coordinating federal and state universal service programs, there is significant potential to accelerate the deployment of high performance broadband service to all consumers across the United States – and to do so efficiently and equitably and in a competitively neutral manner. The Commission to its credit raises this potential in the FNPRM. Given the legal infirmities of its waiver request, ACA suggests New York reconsider its

proposal and work within the FNPRM process to enable the Commission to resolve concerns to best serve the public interest.

Respectfully submitted,

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